Wanyonyi v James & 3 others (Environment and Land Appeal 1 of 2023) [2024] KEELC 5127 (KLR) (Environment and Land) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5127 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL 1 OF 2023

EK WABWOTO, J

JULY 11, 2024

BETWEEN

BENSON L. WANYONYI .... APPELLANT

AND

NICHOLAS KASYOKA JAMES .... 1ST RESPONDENT

JAMES KITETU KAMUYA .... 2ND RESPONDENT

MUTUA KAMUYA .... 3RD RESPONDENT

MUSYOKA KAMUYA .... 4TH RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate Hon. Khapoya S. Benson P.M dated 30th September 2021 in the Taveta Principal Magistrate's Court Land Case No. 8 of 2019)

JUDGMENT

1. This appeal is in respect to the Judgment and decree delivered by Hon. Khapoya S. Benson PM on 30th September 2021 in Taveta PMC Land Case No. 8 of 2019. The learned Magistrate dismissed the Appellant's suit having found that the same was not proved to the required standard.

2. The Appellant being aggrieved by the said judgment filed the instant appeal vide a Memorandum of Appeal dated 26th October 2021. The Appellant raised the following 17 grounds in the appeal which have been replicated verbatim herein: -

    1. The trial Magistrate erred in law and in fact in his judgment dated 30th September 2021 in dismissing the suit.

2. The trial Magistrate erred in law and in fact in his judgment by holding that the Appellant purchased an unsurveyed portion of land at Sir Ramson Block B Chala by an agreement dated 30th August 2021 between the Appellant and Kamuya Kithuka (deceased) and further misdirected himself in fact and in law by finding that the Appellant failed on a balance of probability to prove or establish his case against the defendants.

3. The trial Magistrate erred in law and in fact in his judgment by failing to consider that the 3rd and 4th Defendants admitted in their Statement of Defence, Witness Statements and their testimony that the suit plots belongs to the Appellant and were registered in the name of the 1st and 2nd Respondents in an unclear circumstances.

4. The trial Magistrate erred in law and in fact by failing to consider that ALL the 1st and 2nd Defence Witness Statements were not signed and in their testimony some of the Defence witnesses denied to have written them.

5. The trial Magistrate erred in law and in fact in his judgment by failing to consider that the 1st and 2nd Respondents herein admitted in their Statements of Defences that the Appellant bought the 1.5 acres piece of land at Sir Ramson Block B, Chala from the 1st, 3rd and 4th Respondents' father, Kamuya Kithuka (deceased).

6. The trial Magistrate erred in law and in fact in his judgment by failing to consider at all, all the Appellant's Supporting Evidence filed therein which were never disputed by the Respondents.

7. The trial Magistrate erred in law and in fact in his judgment by failing to consider how the surveying exercise was carried out with the existence of the Court Order in the Mombasa ELC No. 368 of 2016 stopping the surveying exercise particularly in the suit property where the Appellant had invested in.

8. The trial Magistrate erred in law and in fact in his judgment by quickly referring to a statute being the *Land Registration Act* but failed to consider the existence of the injunction Court Order issued by the Hon. A. Omollo in the Mombasa ELC No. 368 of 2016 stopping the surveying exercise particularly on the suit property.

9. The trial Magistrate erred in law and in fact in his judgment by failing to consider that the suit title to the land were acquired illegally, un procedurally and or through corrupt scheme and no officer from the Ministry of Lands and Settlement was called to testify on their behalf.

10. The trial Magistrate erred in law and in fact in his judgment by failing to consider all the evidence placed before him and wrongly relying on the evidence of the 1st and 2nd Respondent who did not know how the suits plots were allocated to them by the Government and or did not demonstrate to the Court how they acquired the title to the suit plots.

11. The trial Magistrate erred in law and in fact in his judgment by only relying and or considering the suit titles as evidence of ownership which titles were un procedurally issued as the title deeds were issued before the demarcation was done. Demarcation was done in 2018 and the title deeds were issued in 2016.

12. The trial Magistrate erred in law and in fact in his judgment by failing to consider that the displacement and demolition by the state was done in a neighbouring farm called Gicheha Farm on Plot No. LR No. 7287 but not Sir Ramson Block B plot known as LR No. 6730/2 where the suit plots are located.

13. The trial Magistrate erred in law and in fact in his judgment by failing to consider the damages caused by the 1st and 2nd Respondents on the Appellant's investments.

14. The trial Magistrate erred in law and in fact in his judgment by failing to consider the investment made by the Appellant on the suit plots which were destroyed by the 1st and 2nd Respondents.

15. In arriving to the judgment, the trial Magistrate failed to consider why the 1st Respondent always ignored Court Orders and Police Summons despite being served and that no steps are taken against him and have never been arrested by the police despite several reports by the Appellant.

16. The trial Magistrate erred in law and in fact in his judgment by relying entirely on allegations of the 1st and 2nd Respondent and failed to consider all the Appellant's evidence, supporting documents filed therein and the Plaintiff's witness statements and testimonies.

17. As a result of this his decision, a travesty of justice has occurred to the Appellant's detriment.

3. The Appellant thus sought for the following reliefs in respect to the appeal; that the decision of the Learned Magistrate be set aside, judgment be entered in his favour as prayed in the trial court and the appeal be allowed with costs.

4. At the hearing of this Appeal, directions were issued to the effect that the appeal be canvassed by way of written submissions. The Appellant filed his written submissions dated 5th April 2024. No written submissions had been filed by the Respondents as at the time the court retired to write its judgment.

5. The Appellant submitted that during the proceedings before the lower court the 3rd and 4th Respondents herein did not file any defence but field Witness Statements supporting the Appellant's claim. It was also submitted that the 3rd and 4th Respondents had stated that they did not understand why and how the 1st and 2nd Respondents got the title deed in their names and yet the suit parcel of land was sold off to the Appellant by their father while still alive.

6. It was also submitted that the 1st and 2nd Respondents had admitted in their statement of defence dated 26th September 2019 that the he bought the parcel of land from their father/grand father while alive and the Agreement of Sale dated 30th August 2012 had not been disputed anywhere in any of their documents filed in court or evidence adduced in court during trial. It was also submitted that the allegations that people were displaced by the State was not substantiated during hearing and no evidence was produced in court to support such. It was also argued that the court had not considered the unsigned witness statements of the 1st and 2nd Respondent.

7. It was contended by the Appellant that the title deed known as Ziwani/Settlement Scheme/102 was in respect to the same piece of land that he bought from Peter Chenze and Stephen Chalo Kimeu and not any other place as alleged by the 1st and 2nd Respondents.

8. It was submitted by the Appellant that the Learned Magistrate failed to consider the fact that the 1st and 2nd Respondents were in disobedience of police summons and court orders when they hired a group of youths to back fill a borehole/well in the suit property.

9. The Appellant concluded his submissions by urging the court to allow the Appeal as prayed.

10. The Court has considered the entire Record of Appeal and submissions filed by the Appellant. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. In *China Zhingxing Construction Company Ltd v Ann Akuru Sophia* [2020] eKLR it was stated as follows:

> "The appropriate standard of review established in these cases can be stated in three complementary principles:
>
> a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
>
> c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time."

11. The Court in the *China Zhongxing Construction Company Ltd case* (*supra*) cited the Court of Appeal for *East Africa in Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt –v-Thomas* (1), [1947] A.C. 484."

12. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.

13. The court has outlined the following issues for determination herein:-

    i. Whether the Appeal is merited.

    ii. What are the appropriate reliefs to grant herein.

14. The Appellant's case before trial court was that on or about 30th August 2012, he entered into an agreement with the 1st, 3rd and 4th Respondent's father one Kamuya Kithuka (now deceased) whereby he purchased un surveyed portion of land situated at Sir Ramson Block B, Chala Division County Government of Taita Taveta being 1.5 acres. The said portion of land was sold by the 1st, 3rd and 4th Respondents father to the Appellant for a sum of Kshs. 105,000/= which sum the Appellant paid to the 1st, 3rd and 4th Respondent's father in the presence of the 3rd and 4th Respondents as per the agreement dated 30th August 2012.

15. It was also the Appellant's case that upon making full payment he took possession of the land and commenced heavy investment on the land. During the survey exercise in 2016, he was not notified and neither did the Respondent's disclose to the Surveyor that the suit land belongs to the Appellant. The

survey was undertaken and the 1st Respondent allocated half of the suit property being Plot No. Ziwani Settlement Scheme/111 measuring 0.8016Ha while 2nd Respondent was allocated plot number Ziwani Settlement Scheme/112 mearing 0.8016Ha and issued with title deeds. The Respondents trespassed into his land and he suffered loss and damage.

16. During trial before the lower court, the Appellant tendered evidence to the effect that the land was sold to him by people who had bought the land from the 1st Respondent. He joined the two pieces to have one block and that the 1st and 2nd Respondents trespassed into his land clearing and uprooted his fence.

17. When cross-examined, he stated that the land was sold to him by the 1st Respondent's father and that he is yet to get back his land.

18. The Appellant also called Jonathan Mutua Kamunya who testified and stated that indeed the land was sold to the Appellant by his father and that the 1st Respondent was not present when the land was sold to the Appellant.

19. The Respondent called 4 witnesses who testified on their behalf. The 1st Respondent testified as DW1. He stated that all the parties were initially squatters on the said land and each person was allocated 2 acres. The Appellant was equally allocated a separate parcel. When cross-examined, he stated that he never sold the land to the Appellant. The 2nd Respondent testified as DW2 and stated that the Appellant never moved to the portion that he had been allocated. In cross-examination, he stated that he could not recall when he was allocated the land, Annastasia Wayua Nthula testified as DW3 and she stated that the land belongs to the 1st Respondent. Each person was given 2 acres. Kiilu Mbote testified as DW4 and he stated that each person was given his or her own land.

20. Article 40 of the *Constitution* of Kenya, elaborates on the right to own property in Kenya. It provides as follows; -

> " (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

21. Indefeasibility of the title is provided for in Section 26 (1) (b) of the *Land Registration Act* which states;

> " The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

22. The Appellant and the Respondents herein both have a right to own property. While a certificate of title shows that the holder of the same is the indefeasible owner of land in question, it is not in doubt the 1st and 2nd Respondents have title to the suit property as contemplated in Section 24 as read together with Section 26 of the *Land Registration Act*, 2012. In the instant case the Appellant claims the same property as the Respondent's even though the Respondents have titles. This court must therefore look

at the root of the same as was well appreciated in the case of Hubert L. *Martin & 2 Others =Versus= Margaret J. Kamar & 5 Others* (2016) eKLR.

23. From the evidence adduced herein it is evident that the 1st and 2nd Respondents are currently the registered proprietors of the suit property which they were allocated after the survey and adjudication process. The Appellant while he alleged that he acquired the land he purchased as an unsurveyed land did not adduce any evidence as to why he did not object to the survey, demarcation and adjudication process.

24. Section 13 (1) of the *Land Adjudication Act* states as follows: -

> " Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act."

25. It follows that following the declaration of an area as an adjudication section and on application of this Section 13 (1), every person who has an interest in land whether as a purchaser as the appellant alleges she is or otherwise could assert their rights. The essence of this was to ascertain the rights and interests of persons in an adjudication section.

26. From the adduced evidence, there was no objection to the adjudication register and consequently the suit property was subjected to Section 26(A) (1) of the *Land Adjudication Act* which is a tail end process. By this provision, the director of land adjudication remits documents to the chief land registrar for registration. This provision states as follows: -

> " (1) When the time for objection under section 26(1) has expired, the adjudication officer shall prepare a No Objection Register in respect of any land not subject to an objection, and deliver the same to the Director of Land Adjudication who shall—

(a) certify thereon and on the duplicate adjudication register that the adjudication of the land set out therein has become final; and

(b) forward the No Objection Register together with a copy of the duplicate adjudication register to the Chief Land Registrar for the purpose of registration under section 28."

27. This process brought ascertainment of rights over land under the said Act to a conclusion and by virtue of Section 28 of this Act, the land registrar registers land in this case the suit property and this is done in accordance with Sections 6 and 7 of the *Land Registration Act*.

28. This registration vested the proprietor in this case the 1st respondent with rights and ownership to the land. See Sections 24 and 25 of the *Land Registration Act*. However, even as a 1st registration, this title could be challenged under Section 26 (1) of this *Act* if it was acquired by means of fraud, misrepresentation, illegality, unprocedural manner or through a corrupt scheme. This provision is a departure from Section 143 of the repealed *Registered Land Act* which provided that upon 1st registration, a claim of fraud or mistake is unsustainable over a suit property.

29. The question then that suffices is whether Section 26 (1) of the *Land Registration Act* means that a court can blanketly entertain a claim of fraud notwithstanding the intricate mechanisms of the *Land Adjudication Act*. This has been the subject of interpretation and courts have held that the court shall

only entertain such a case if it is a new cause of action. In the decision of *Nicholas Njeru v Attorney General & 8 others* [2013] eKLR which I hereby adopt, the Court of Appeal stated: -

> " However we do not entirely agree with the learned Judge's observation that the court had no jurisdiction to grant a declaratory order... We agree with the trial Judge that during the various proceedings the issues in this appeal were perhaps thrashed almost to the pulp and the dispute over which clan owned the suit property had long been determined. We will also look at what the appellants referred as 'the new cause of action."

30. A similar position was taken by the well cited persuasive decision of *Dume Deri Mumbo & 19 others (suing on their behalf and on behalf of Wandarari Clan v Cabinet Secretary of Lands, Housing & Urban Development & 6 others* [2016] eKLR which held: -

> " ...although a litigant can file a suit in a matter where the adjudication register, pursuant to the provisions of the *Land Adjudication Act*, has been closed and a title deed issued,.. Consequently, the court can only interfere with the decision of the bodies established under the Act by way of Judicial Review proceedings or where a new cause of action is introduced after the proceedings of the Minister have closed. Then, and only then can the court interfere by way of an ordinary suit or Judicial Review Proceedings."

31. In the instant case, the Appellant if he felt aggrieved by the adjudication process ought to have complied with the procedure outlined in the Act. No reasons were tendered as to why the Appellant who alleged to have taken possession was cultivating in the suit property failed to comply with the procedure stipulated under the said act. The said statutory provisions ought to have been complied.

32. The Court has perused the pleadings that were filed by the Appellant in the lower court, the Appellant never pleaded not particularised and fraud on the part of the Respondents necessitating the impeachment of the Respondents title. The Court refers to the case of *Martha Chelal & Another –v- Elijah Kipkemoi Boiywo & 2 others* (2019) eKLR where the court observed that Section 26 of the *Land Registration Act* provides for indefeasibility of title and protection of title holders but it also provides for impeachment of titles that have been procured fraudulently by mistake or by misrepresentation.

33. In the circumstances, having found that the Appellant failed to register his interest in the land during the survey, demarcation and adjudication process and further that the Appellant never adduced any evidence warranting the impeachment of the Respondents titles, it is the finding of this court that the Appellant failed to prove his case before the trial court and as such this appeal fails.

34. In conclusion, it is the finding of this court that the Appeal herein is devoid of merit and, in the circumstances, the same is hereby dismissed with an order that each party shall bear own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 11TH DAY OF JULY 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Court Assistants: Mary Ngoira and Norah Chao.

Benson Wanyonyi Appellant appearing in person.

N/A for Respondents.